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Since 1963, Congress has prohibited employers from paying women less than men due to their gender.[1] Employers, however, have proffered several justifications for a wage disparity between men and women, including the lower market wage rate for women.[2] Courts have treated this "market defense" differently depending mostly upon whether the plaintiff brings her claim under the Equal Pay Act[3] or under Title VII of the Civil Rights Act of 1964.[4] By relying only on the statute used by the plaintiff to bring suit while ignoring the policy considerations behind each theory of recovery, courts sometimes allow the use of the market defense beyond its intended scope.

This note analyzes the treatment of the market defense in employment discrimination suits. Part I reviews the market defense theory in cases brought under the Equal Pay Act, while Part II studies the use of market wages under Title VII of the Civil Rights Act of 1964. Part III suggests that courts should carefully examine the equality of work in cases brought under the alternative acts, to insure that the policy justifications under each theory of recovery are properly served.

I. The Equal Pay Act

Passed in 1963, the Equal Pay Act forbids an employer from paying a woman less than a man for performing an equal or sub-

1 *See* notes 3-4 *infra* and accompanying text.

2 The market wage rate, in this context, represents the wage or salary that a person can command in the labor market for performing a given task. Employers have advanced the market rate theory as a defense in employment discrimination suits by arguing that the market wage rate for women was lower than for men either when performing equal work, *see* notes 5-14 *infra* and accompanying text, or different tasks, *see* notes 20-35 *infra* and accompanying text. On the other hand, plaintiffs in some wage discrimination cases have advanced the market rate theory in their complaints, pleading that an employer has wrongfully relied upon the market wage rate to set a woman's wage. *See* notes 36-46 *infra* and accompanying text.

Employers have proffered several other justifications for a wage disparity. *See, e.g.*, Hamm v. Board of Regents, 708 F.2d 647 (11th Cir. 1983) (educational achievement/extra duties); Horner v. Mary Inst., 613 F.2d 706 (8th Cir. 1980) (superior qualifications); Usery v. Johnson, 436 F. Supp. 35 (D.N.D. 1977) (participation in a management training program).

3 Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified at 29 U.S.C. § 206(d)(1) (1982)).

4 Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000e (1982)).

stantially equal task.[5] The plaintiff bears the burden of proving equal work.[6] The Act also provides employers with four affirmative defenses. Upon proof that an employer pays a woman less than a man in a substantially equal job, the employer must show that the disparity is due to: (1) seniority, (2) merit, (3) quality or quantity of production, or (4) any factor other than sex.[7] Employers who have paid women less than men for performing the same task have claimed that they did not violate the Act because they relied on the fact that men commanded a higher wage than women in the market. Thus, their reliance on the market wage rate fell under the fourth defense—a factor other than sex.[8] Although courts have allowed use of verifiable economic factors unrelated to the labor market in calculating a different wage for men and women, employers cannot use the market wage rate alone as a defense.

Early treatment of the market defense to the Equal Pay Act cases varied. *Hodgson v. Brookhaven General Hospital*[9] represented one line of cases, comprised mostly of decisions from the Court of Appeals for the Fifth Circuit, which found that an employer's greater bargaining power with respect to women did not fulfill the

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5 The Equal Pay Act, in pertinent part, provides that:

> No employer having employees subject to any provisions of this section shall discriminate, . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1) (1982) (emphasis in original).

6 Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974). Substantially equal work fulfills this requirement for the plaintiff. *See, e.g.*, Usery v. Columbia Univ., 568 F.2d 953, 958-59 (2d Cir. 1977); Brennan v. Prince William Hosp. Corp., 503 F.2d 282, 285-86 (4th Cir. 1974). In comparing two jobs to determine equality of work, job titles are not determinitive. *See* Spaulding v. University of Wash., 740 F.2d 686, 697 (9th Cir. 1984); EEOC v. Mercy Hosp. & Medical Center, 709 F.2d 1195, 1197 (7th Cir. 1983); 29 C.F.R. § 800.121 (1985).

7 *See* note 5 *supra*.

8 *See generally* Note, *Not Just Any "Factor Other Than Sex": An Analysis of the Fourth Affirmative Defense to the Equal Pay Act*, 52 GEO. WASH. L. REV. 318 (1984) (explores the scope of the "factor other than sex" defense to the Equal Pay Act as defined judicially).

9 436 F.2d 719 (5th Cir. 1970). In *Brookhaven*, female nurses' aides sued defendant hospital contending that they were paid less than male orderlies for substantially equal work. The hospital asserted that the additional duties sometimes performed by orderlies, including lifting heavy patients and catheterizing patients, distinguished the case from application of an equal work standard. The court found that the relevant inquiry when determining the equality of two jobs was whether the jobs required equal effort, and remanded the case for findings of fact. *Id.* at 725.

"factor other than sex" defense.[10] The *Brookhaven* court found that this greater bargaining power was "not the kind of factor Congress had in mind" when creating the fourth affirmative defense, and thus would not allow a market rate defense by the hospital.[11]

This line of cases contrasted with *Hodgson v. Robert Hall Clothes, Inc.*,[12] where the United States Court of Appeals for the Third Circuit found that the disparity in wages between men and women salespersons performing equal work was justified by the greater economic value of the male salespersons to the employer. Robert Hall showed that the men's department of the store earned substantially greater profits than the women's, and that only men sold men's clothing and vice versa.[13] The court held that the increased economic benefit to the employer was a factor other than sex which Robert Hall could use as an affirmative defense against the Equal Pay Act discrimination claim.[14]

The United States Supreme Court considered the issue of the market as a factor other than sex under the Equal Pay Act in 1974. In *Corning Glass Works v. Brennan*,[15] the Court held that Corning violated the Equal Pay Act by paying male inspectors more than female inspectors performing substantially equal work.[16] This decision,

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10 *Id.* at 726. *See also* Brennan v. Prince William Hosp. Corp., 503 F.2d 282, 286 (4th Cir. 1974); Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 902 (5th Cir. 1974); Brennan v. City Stores, Inc., 479 F.2d 235, 241 n.12 (5th Cir. 1973); Hodgson v. Maison Miramon, Inc., 344 F. Supp. 843, 850 (E.D. La. 1972).

11 436 F.2d at 726.

12 473 F.2d 589 (3d Cir. 1973). In *Robert Hall*, female salespersons selling women's clothing brought suit under the Equal Pay Act alleging unequal pay for work equal to male salespersons selling men's clothing. The differential resulted from the commission sales schedule. Because men's clothing sold at a higher profit margin for the company, male salespersons received higher salaries than female salespersons. *Id.* at 591-92.

13 *Id.* at 591, 596.

14 *Id.* at 597. *Robert Hall* represents the farthest any court has gone to allow an economic justification as a factor other than sex, and commentators criticized the decision when it was handed down. *See, e.g.*, Note, *Equal Pay Act and Title VII of the Civil Rights Act of 1964—Greater Profitability of Male Salesclerks Permits Unequal Pay for Female Salesclerks in Clothing Sales*, 20 WAYNE L. REV. 1155 (1974); Case Comment, Hodgson v. Robert Hall Clothes, Inc.: *Concealed Sex Discrimination and the Equal Pay Act*, 122 U. PA. L. REV. 1033 (1974).

15 417 U.S. 188 (1974).

16 *Id.* at 209-10. In *Corning*, because a state law had previously precluded women from working at night, most female inspectors worked during the day while most male inspectors worked at night. The Court had to decide whether the difference between day shifts and night shifts constituted different working conditions so that the Equal Pay Act would not apply to the wage differential. *See* note 5 *supra* ("and which are performed under similar working conditions . . ."). The Court stated that recognizing the difference in the time of the shifts as constituting different working conditions would frustrate the remedial purposes of the Act. 417 U.S. at 208. Accordingly, the Court held that the day and night shifts were not different working conditions. *Id.* At least one commentator has suggested that this holding was due in part to testimony given by Corning's former Director of Industrial Relations to House and Senate subcommittees considering the Equal Pay Act. *See* W. FOGEL, THE EQUAL PAY ACT: IMPLICATIONS FOR COMPARABLE WORTH 51-53 (1984). The testimony revealed that Corning's own job evaluation plans included two categories under

which marks the only treatment by the Court of the market defense to the Equal Pay Act, rejected the market defense uneqivocally.

> The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.[17]

In effect, the Supreme Court affirmed the *Brookhaven* line of cases, since the job market alone could not be used as a factor other than sex defense,[18] but did not overrule the *Robert Hall* formulation. Because the employer in *Robert Hall* could point to a verifiable factor other than sex, namely the higher profitability of the work performed by male salespersons as compared to the substantially equal work performed by the female salespersons, the market wage alone was *not* the basis of the affirmative defense.[19] Therefore, *Corning* did not undermine the *Robert Hall* rationale. Rather, *Corning* held that the labor market alone was not a factor other than sex, and did not evaluate a verifiable economic factor as found in *Robert Hall*.

II. Title VII

The Equal Pay Act represents only one theory under which a plaintiff can allege sex-based wage discrimination, a theory based on equal work.[20] When Congress passed Title VII of the Civil Rights Act of 1964,[21] federal proscription of employment discrimination expanded to reach non-equal work situations.[22] Courts have

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"working conditions": surroundings and hazards. Time of day never entered the discussion, either internally at Corning or in the testimony before the subcommittees. *Id.*

17 417 U.S. at 205.

18 *See* notes 9-11 *supra* and accompanying text.

19 *See* notes 12-14 *supra* and accompanying text.

20 *See* notes 5-6 *supra*.

21 Pub. L. No. 88-352, § 703(A)(1), 78 Stat. 241, 255 (1964) (codified at 42 U.S.C. § 2000e-2(a)(1) (1982)).

22 *Id.* ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation . . . because of such individual's . . . sex . . . ."). *See also* County of Washington v. Gunther, 452 U.S. 161 (1981). In *Gunther*, female guards in the female section of the county jail sued the county under Title VII. The guards claimed that they were paid less than male guards in the male section of the jail for substantially equal work. The employer claimed that the Bennett Amendment to Title VII (Pub. L. No. 88-352, § 703(h), 78 Stat. 241, 257 (1964) (codified at 42 U.S.C. § 2000e-2(h) (1982)), which allowed any differentiation in wages "authorized" by the Equal Pay Act, precluded any Title VII wage discrimination case which could not fulfill the equal work requirement of the Equal Pay Act. *See* note 5 *supra*. The female guards contended that the Bennett Amendment only incorporated the affirmative defenses of the Equal Pay Act into Title VII, and not the equal work requirement. The Supreme Court opted for the latter interpretation, holding that the affirmative defenses of the Equal Pay Act were incorporated

developed two theories of recovery under Title VII, and each theory treats the market wage rate differently.

A. *Disparate Treatment*

Under a disparate treatment theory of recovery, the plaintiff must show a disfavorable treatment of employees based on impermissible criteria, such as gender, race, or religion.[23] This showing creates a prima facie presumption of discriminatory intent.[24] The defendant then bears the burden of producing some "legitimate, non-discriminatory reason" for the disfavorable treatment.[25] If the defendant meets this burden, the plaintiff must then prove, by a preponderance of the evidence, that the reasons advanced by the employer are in fact only a pretext for discrimination.[26]

In a disparate treatment wage discrimination case, the plaintiff can meet her prima facie burden by showing four elements: (1) she is a woman; (2) she occupies a sex-segregated job classification; (3) the classification is paid less than a sex-segregated job classification occupied by men; and (4) that the two job classifications are so similar that a court can infer that they are of comparable value to the employer.[27] The employer can then produce evidence that the market wage rate constituted a legitimate, non-discriminatory reason for the differential.[28]

Courts have favorably responded to the use of a market rate by employers as a legitimate, non-discriminatory reason to defend a wage differential. For example, in *Briggs v. City of Madison*,[29] public health nurses, most of whom were female, brought a claim under

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into Title VII by the Bennett Amendment, but the equal work requirement was not. 452 U.S. at 168.

23 *See generally* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983) (discrimination based on race); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) (discrimination based on sex); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) (sex); Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978) (race); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (race).

24 *McDonnell Douglas*, 411 U.S. at 802. Some cases have set forth specific tests to meet this burden. *McDonnell Douglas*, for example, held that:

> This [burden may be met] by showing (i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. (footnote omitted). All cases are clear, however, that these tests must be flexible to fit the facts of each particular case. *See, e.g., id.* at 802 n.13.

25 *Id.* at 802.

26 *Id.* at 804. *See generally* Chamallas, *Exploring the "Entire Spectrum" of Disparate Treatment Under Title VII: Rules Governing Predominately Female Jobs*, 1984 U. ILL. L. REV. 1, 5-22 (reviewing judicial development of the disparate treatment model).

27 Briggs v. City of Madison, 536 F. Supp. 435, 445 (W.D. Wis. 1982).

28 *See* note 25 *supra* and accompanying text.

29 536 F. Supp. 435 (W.D. Wis. 1982).

the disparate treatment theory of Title VII against the city. The nurses alleged that they were paid less due to their sex even though they performed work equal or greater in skill, effort, and responsibility than public health sanitarians, most of whom were male.[30] After the court found that the nurses had met their prima facie burden to establish a discriminatory presumption,[31] the defendant pointed to the higher market wage for male sanitarians as a legitimate, non-discriminatory reason for the wage disparity.[32] The court accepted this justification, holding that an employer's liability under Title VII extends only to his own actions,[33] and not "to conditions of the marketplace which he did not create."[34] Because the plaintiff could not subsequently show that the city's reliance on the market was only a pretext, the court found no violation of Title VII.[35]

B. *Disparate Impact*

Courts are more amenable to market-based justifications of wage disparities under the disparate impact model than under the disparate treatment model. Under the disparate impact model, the plaintiff need not show or imply the defendant's discriminatory intent. Instead, the plaintiff need only show a disproportionate impact on a group protected by Title VII due to a "facially neutral policy" of the employer.[36] Once the plaintiff makes this showing, the burden switches to the defendant. If the defendant can prove that the policy is required by a business necessity, the policy will not violate Title VII.[37] Contrast this model with the disparate treat-

30 *Id.* at 437.

31 *See* text accompanying note 27 *supra* (test employed by the *Briggs* court to find that plaintiffs met their prima facie burden).

32 536 F. Supp. at 446.

33 *Id.* at 447. *See also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (proof of discriminatory motive is critical to a disparate treatment claim).

34 536 F. Supp. at 447.

35 *Id.* at 449-50.

36 *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). In *Griggs*, an employee brought a Title VII action against the employer power company, alleging that requiring a high school diploma and satisfactory scores on two aptitude tests would disproportionately impact upon blacks. The Court noted that Congress intended Title VII to remove barriers that had acted to favor white employees over others in the past. This purpose mandated that "practices, procedures, or tests, *neutral on their face*, and even neutral in terms of intent" be eliminated. *Id.* at 430 (emphasis added). The Court then stated the test for disparate impact cases. "The touchstone is business necessity. If an employment practice which operates to exclude [a protected class] cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.

37 *Id. See generally* Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376 (1981) (traces judicial evolution of the business necessity defense to disparate impact claims, comparing the Supreme Court with lower federal court developments).

ment model, where the plaintiff always has the burden of proof.[38]

In the disparate impact model, the plaintiff advances the market rate argument by claiming that reliance on the market wage demonstrates a facially neutral policy of the employer which disproportionately impacts upon women.[39] Courts have not accepted this argument, holding that the labor market does not constitute an internal policy for purposes of Title VII disparate impact analysis.[40] The United States Court of Appeals for the Ninth Circuit dealt specifically with this issue in *Spaulding v. University of Washington*.[41]

In *Spaulding*, the nursing faculty of the University of Washington alleged sex-based wage discrimination under the disparate impact model because they were paid less, on average, than the average faculty member of less female-dominated departments.[42] The court rejected the faculty's claim. The court held that a wage differential between jobs requiring different skills did not violate Title VII when the jobs commanded different prices in the labor market, even if the jobs were of equal worth to the employer.[43] Specifically, the court found that "[r]elying on competitive market prices does not qualify as a facially neutral policy for purposes of the disparate impact analysis . . . ."[44] Because the University relied as "price-takers" on the price of labor, the market wage rate, the court reasoned that the University did not have a disparate impact "policy" concerning the market.[45] Therefore, the University did not violate Title VII by relying on the market to set faculty wages.[46]

III. The Importance of Equal Work

Courts treat the market rate theory differently depending on

38 *See* notes 23-26 *supra* and accompanying text.

39 *See* AFSCME v. Washington, 770 F.2d 1401, 1405 (9th Cir. 1985); Spaulding v. University of Wash., 740 F.2d 686, 705 (9th Cir. 1984); Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977).

40 *See, e.g., AFSCME*, 770 F.2d at 1405-06; *Spaulding*, 740 F.2d at 707; *Christensen*, 563 F.2d at 356.

41 740 F.2d 686 (9th Cir. 1984).

42 *Id.* at 705-08. The faculty also charged violation of the Equal Pay Act and disparate treatment under Title VII; these claims failed. *Id.* at 696-98, 699-704.

43 *Id.* at 707 (citing Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977)).

44 740 F.2d at 708.

45 *Id.* The *Spaulding* court draws an artificial distinction here. Courts have prohibited employers from instituting policies based on other factors beyond the control of the employer in disparate impact cases. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (possession of a high school diploma); Gregory v. Litton Sys., 316 F. Supp. 401 (C.D. Cal. 1970) (prior arrest record), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972). *But cf.* AFSCME v. Washington, 770 F.2d 1401, 1405-06 (9th Cir. 1985) (finding that relying on market rates when setting wages was not a "specific, clearly deliniated employment practice . . . that yields to disparate impact analysis").

46 740 F.2d at 708.

whether the plaintiff brings her claim under the Equal Pay Act or Title VII, and the theory of recovery used under Title VII. Courts deciding cases under the Equal Pay Act give less deference to an employer's reliance on the market than in Title VII cases. The equal work requirement of the Equal Pay Act explains the different treatment.[47] In *Briggs v. City of Madison*,[48] the court identified the significance of the equal work requirement:

> In the cited Equal Pay Act cases, the jobs were so similar as to be interchangeable; that is, a female worker could perform the job held by male workers, if given the opportunity, and vice versa. Where, however, different skills are required for the performance of the jobs, the employer may explain and justify an apparent illegal wage disparity by showing that persons possessing the requisite skills are commanding higher wage rates in the local market.[49]

An employer paying different wages to a man and woman whose jobs involve equal work cannot argue that the market wage rate justified the discrepancy.[50] Because the employer is receiving the same effort from these two individuals, reliance on an external factor like the market wage rate implies that the factor is actually a pretext for sex-based wage discrimination.[51] The equality of the work performed by the man and woman precludes the employer from relying on the bifurcated market wage to determine compensation.[52]

On the other hand, a non-equal work scenario makes an implication of sex discrimination more difficult. The employer no longer receives an equal effort from the man and woman, so the benefit derived from their efforts may differ as well. Many factors enter the employer's wage setting analysis, such as the number of available individuals qualified to fill the position, the ability of workers to bargain collectively, and the intrinsic value of the work to the employer.[53] Without a job entailing equal work for comparison, the best barometer available to the employer in setting wages for a job is the market wage rate for that job.[54] In this situation, the mar-

47 *See* notes 5-6 *supra* and accompanying text.

48 536 F. Supp. 435 (W.D. Wis. 1982). *See* notes 29-35 *supra* and accompanying text.

49 *Id.* at 447.

50 *See* notes 9-11, 15-19 *supra* and accompanying text.

51 *See generally* Kouba v. Allstate Ins. Co., 523 F. Supp. 148, 160-62 (E.D. Cal. 1981), *rev'd*, 691 F.2d 873 (9th Cir. 1982).

52 *See* Note, *The Exception Swallows the Rule: Market Conditions as a "Factor Other Than Sex" in Title VII Disparate Impact Litigation*, 86 W. VA. L. REV. 165, 172 (1984) (noting that Equal Pay Act treatment of the market defense only applies to equal work situations).

53 *See* AFSCME v. Washington, 770 F.2d 1401, 1407 (9th Cir. 1985); Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977).

54 *See* Shattuck, *Sex-Based Wage Discrimination: A Management View*, 62 DEN. L. REV. 393, 400-02 (1985) (arguing that the market takes into account basic values of the job, such as

ket wage rate reflects not a discriminatory pretext but a valid indicator used by the employer to set wages.[55]

Therefore, the equality of the work should determine the availability of the market wage rate as a defense to employment discrimination suits, rather than the statute under which the plaintiff brings suit. To retain this crucial distinction, courts should categorize cases according to the equality of the work involved, and use this categorization to determine the availability of a market wage rate defense to the employer.

A. *A Case for Examination*: Kouba v. Allstate Insurance Co.

Kouba v. Allstate Insurance Co.[56] demonstrates how a court can confuse the issues by ignoring the equality of the work and focusing instead on the statute used by the plaintiff to bring suit. In *Kouba*, a female sales agent brought suit under Title VII representing a class of all female sales agents, and claimed that Allstate discriminated in setting wages by relying in part on the individual's prior salary to set his or her minimum salary.[57] Female agents averaged a lower minimum salary then male agents performing the same task.[58] The plaintiff argued that the use of prior salary caused this disparity

skills, education, experience, and working conditions). *But see* Blumrosen, *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397, 441-43 (1979) (arguing that dependence on the market wage rate in setting wages perpetuates historical wage discrimination in predominately female jobs).

55 *See* American Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986). In *American Nurses'*, Judge Posner of the United States Court of Appeals for the Seventh Circuit discussed in detail the use of the market wage rate defense by employers to set wages. The American Nurses' Association and others brought suit against the State of Illinois, charging sex discrimination under Title VII. The plaintiffs claimed that the State discriminated against traditionally female-dominated jobs when setting wages. In general terms, Judge Posner stated that "economists point out that the ratio of wages in different jobs is determined by the market rather than by any a priori conception of relative merit . . . ." *Id.* at 719. Judge Posner then recognized that "mere failure to rectify traditional wage disparaties between predominately male and predominately female jobs [does not violate] federal law." *Id.* at 720 (citing *Spaulding v. University of Wash.*, 740 F.2d 686, 706-07 (9th Cir. 1984)); *see* notes 41-46 *supra* and accompanying text. He then approached the question of whether reliance on the market wage rate could permit an inference of intentional discrimination. This question was crucial to the case, since the plaintiffs sued under a disparate treatment model. 783 F.2d at 722; *see* notes 23-26 *supra* and accompanying text.

Judge Posner relied on the dissent in County of Wash. v. Gunther, 452 U.S. 161, 181 (1981) (Rehnquist, J., dissenting) (note 22 *supra*), and on AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985) (note 39 *supra*), to find that Title VII does not permit an inference of discrimination based on an employer paying market wages. 783 F.2d at 720-22. Because *American Nurses'* and the two cases cited therein do not involve equal work, this note agrees with the courts' conclusion to the extent that the market wage rate can be used by employers to set wages in *non-equal work* situations. If an equal work suit were brought under Title VII, however, this note would contend that the equality of the work should preclude the employer from relying on the market wage rate.

56 691 F.2d 873 (9th Cir. 1982).

57 *Id.* at 875.

58 *Id.*

which, in turn, violated Title VII.[59] The defendant asserted that prior salary constituted a valid factor other than sex,[60] an affirmative defense under the Equal Pay Act.[61]

Allstate contended that, because Kouba brought suit under Title VII, the standard Title VII evidentiary burdens should apply.[62] The Court of Appeals for the Ninth Circuit disagreed, finding that an employer bears the burden of proving that a wage differential results from a factor other than sex, even when the plaintiff brings suit under Title VII.[63] The court then proceeded to determine how the employer could carry this burden.

At this point, the court's blindness to the equal work performed by the male and female agents surfaced.[64] The court never alluded to the equal work of the agents, and did not apply the analyses from cases involving prior salary as a wage setting factor in equal work suits[65] or other economic justifications used by employers in equal work situations.[66] The absence of equal work analysis is particularly interesting since the court relied on *Corning Glass Works v. Brennan*,[67] an equal work case decided under the Equal Pay Act, to find the burden on the employer to prove prior salary as a factor other than sex.[68]

Rather than follow a traditional Equal Pay Act approach, the court created a new line of analysis: a factor other than sex, when pleaded in a Title VII wage discrimination suit, must have an ac-

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59 *Id.*

60 A helpful discussion of prior salary as a factor other than sex can be found in Futran v. RING Radio Co., 501 F. Supp. 734 (N.D. Ga. 1980). In *Futran*, a female radio personality sued the defendant radio station, claiming sex-based wage discrimination because a male radio personality was paid considerably more for substantially equal work. The employer advanced prior salary as one factor other than sex to justify the differential. The court discounted this defense, stating that "to give more than nominal consideration to such a factor would serve to perpetuate the historic employment discrimination in wages suffered by females in the workforce." *Id.* at 739 n.2. Given the close connection between plaintiff's prior salary and her market wage rate, the same analysis should apply to each factor when asserted as a defense.

61 691 F.2d at 875. *See* notes 5-8 *supra* and accompanying text.

62 *Id.* Neither Kouba nor the court specified whether the case was pleaded under a disparate impact or disparate treatment theory. *See id.* at 875 n.4.

63 *Id.* at 875. The court came to this conclusion based on the fact that the Supreme Court, in Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974), had interpreted the factor other than sex language from the Equal Pay Act as an affirmative defense for the employer. *See* notes 15-17 *supra* and accompanying text.

64 *See* text accompanying note 58 *supra*.

65 *See, e.g.*, Futran v. RING Radio Co., 501 F. Supp. 734 (N.D. Ga. 1980); note 60 *supra*. While the *Kouba* court did cite generally to the mention of prior salary in *Futran* (691 F.2d at 876, 877 n.7), it did not apply the analysis given by the *Futran* court concerning prior salary as a factor other than sex.

66 *See, e.g.*, *Corning Glass*, 417 U.S. 188; Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589 (3rd Cir. 1973); notes 12-17 *supra* and accompanying text.

67 417 U.S. 188 (1974). *See* notes 15-17 *supra*.

68 *See* note 63 *supra* and accompanying text.

ceptable business reason.[69] In a footnote to this new approach, the court cited to *Corning Glass* for the proposition that "[n]ot every reason making economic sense is acceptable."[70] Given this mention of *Corning Glass* by the court, and given the similarity in language to the business necessity defense under the disparate impact model of Title VII,[71] the *Kouba* court apparently intended to set a new line of analysis to be used when a defendant to a Title VII wage suit pleads a factor other than sex to defend the suit. This "split-the-difference" approach, however, confuses the issue unnecessarily, and courts should not use it to judge economic justifications to wage discrimination suits.[72]

1. *Kouba* under the Equal Pay Act

If *Kouba* were treated as an Equal Pay Act claim, the cases clearly indicate that some factor *aside from* the market would have to justify the wage differential.[73] Kouba could meet her prima facie burden under the Act by showing that she and other female agents were paid less for work equal to male agents.[74] Allstate would then plead prior salary as an affirmative defense, just as they actually did plead.[75]

The farthest any court has gone in allowing an economic consideration to fulfill this requirement was *Hodgson v. Robert Hall Clothes, Inc.*[76] In *Robert Hall*, the court held that the increased profitability of male salespersons justified their higher wage over female salespersons.[77] In *Kouba*, however, Allstate proffered no such factor; the prior salary of the employee does not affect the profitability of his or her performance.[78] In fact, *Kouba* recognized the possibility of an employer using prior salary as a pretext to discrimina-

69 691 F.2d at 876. *But cf.* Bence v. Detroit Health Corp., 712 F.2d 1024, 1030 (6th Cir. 1983) (reading *Kouba* as employing the *Robert Hall* rationale).

70 *Id.* at 876 n.6. *See* text accompanying note 17 *supra*.

71 *See* notes 36-38 *supra* and accompanying text.

72 At least one court has followed *Kouba's* "acceptable business reason" approach. *See* EEOC v. Fremont Christian School, 609 F. Supp. 344, 351 (N.D. Cal. 1984), *aff'd on other grounds*, 781 F.2d 1362 (9th Cir. 1986).

73 *See* notes 9-19 *supra* and accompanying text.

74 *See Corning Glass*, 417 U.S. at 195; notes 5-6 *supra*. Some courts have found that Equal Pay Act burdens apply where, as in *Kouba*, the plaintiff brings an equal work claim under Title VII. *See* Orahood v. Board of Trustees, 645 F.2d 651, 654 & n.3 (8th Cir. 1981); Chang v. University of Rhode Island, 606 F. Supp. 1161, 1188 (D.R.I. 1985); Schulte v. Wilson Indus., Inc., 547 F. Supp. 324, 337 (S.D. Tex. 1982). These cases have not used the analysis of this note to justify the rulings, but rather have based the rulings on a desire to construe the two statutes in harmony. *See, e.g.*, 645 F.2d at 654.

75 *See* notes 60-61 *supra* and accompanying text.

76 473 F.2d 589 (3d Cir. 1973). *See* notes 12-14 *supra* and accompanying text.

77 *See* note 14 *supra* and accompanying text.

78 *See Kouba*, 691 F.2d at 876-78.

tion.[79] This possibility seems analogous to the market rate concerns expressed in *Briggs v. City of Madison*[80] in that two employees being paid differently for substantially equal work strengthens the inference of sex discrimination.[81] Therefore, reliance on prior salary would not likely survive as an Equal Pay Act factor other than sex.

2. *Kouba* as a Non-Equal Work Case Under Title VII

Assuming *arguendo* that the jobs compared in *Kouba* did not entail equal work, courts would likely allow Allstate to use prior salary as a wage setting factor. Under the disparate treatment model,[82] the employer could advance prior salary as a legitimate, non-discriminatory reason for the wage disparity.[83] Analogizing to treatment of the market wage rate under this scenario,[84] courts would likely hold that Allstate could not be held responsible for market conditions that they did not create.[85]

If the plaintiff chose a disparate impact model to frame the case,[86] Allstate's use of the factor seems even more certain. The reliance on prior salary would not be an internal policy for purposes of Title VII, analogizing again to market wage rate decisions.[87] Therefore, the plaintiff's prima facie case would not be carried under the disparate impact model of Title VII.[88]

IV. Conclusion

The equal work requirement of the Equal Pay Act explains the denial of a market wage rate defense to employers in wage discrimination suits brought under the Act. Equal work suits, however, can be brought under Title VII as well.[89] Courts have been more amenable to the market wage rate and other economic justifications for unequal wages in Title VII cases than under the Equal Pay Act. To ensure that the policy concerns behind the denial of the market de-

79 *Id.* at 876. *See also* EEOC v. Hay Assoc., 545 F. Supp. 1064, 1084 (E.D. Pa. 1982) (finding that economic benefit could only justify unequal salaries if it could prove the man's work more profitable).

80 536 F. Supp. 435, 445 (W.D. Wis. 1982); *see* text accompanying notes 48-49 *supra*.

81 *See* notes 47-52 *supra* and accompanying text.

82 *See* notes 23-28 *supra* and accompanying text.

83 *See* text accompanying note 25 *supra*.

84 *See* notes 29-35 *supra* and accompanying text.

85 *See* text accompanying notes 33-34 *supra*.

86 *See* notes 36-46 *supra* and accompanying text.

87 *See* notes 39-46 *supra* and accompanying text.

88 *See* notes 36-38 *supra* and accompanying text.

89 In most cases, a plaintiff would choose to bring an equal work suit under the Equal Pay Act, due to the more generous statute of limitations and the absence of administrative remedies to exhaust before bringing the claim to court. County of Wash. v. Gunther, 452 U.S. 161, 175 n.14 (1981).

fense in the Equal Pay Act cases are not controverted, courts should focus on the equality of work when determining the availability of an economic justification for a sex-based wage disparity.

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